[1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

WAYNE BENJAMIN,

Plaintiff,

- against-

SHEILA B. HEATH,

Defendant.

INDEX NO. 107940/2007

MOTION DATE

MOTION SEQ. NO. 001, ~~002, 003~~

MOTION CAL. NO.

SHEILA B. HEATH,

Third-Party Plaintiff,

-against-

BIN GONG, YOUAMY E. FELIZ and ROSLYN LEASING, INC.,

Third-Party Defendants.

FILED
OCT 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

BIN GONG,

Second Third-Party Plaintiff,

- against-

VICTOR A. PIMENTAL and AMADOU TRAORE,

Second Third-Party Defendants.

The following papers, numbered 1 to 16, were read on the motions for summary judgment of (1) Bin Gong, (2) Youamy E. Feliz and Victor A. Pimentel, and (3) Roslyn Leasing, Inc. and Amadou Traore; and on the cross-motions for summary judgment of (1) Bin Gong, and (2) Roslyn Leasing, Inc. and Amadou Traore. Motion Seq. No. 001, 002 and 003 are consolidated for disposition.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4, 5
Answering Affidavits — Exhibits (Memo)	6, 7, 8, 9, 10, 11
Replying Affidavits (Reply Memo)	12, 13, 14, 15, 16

Cross-Motion: ■ Yes ☐ No

This is an action arising from a five-car motor vehicle accident that occurred on June 13, 2006, on the southbound FDR near its intersection with East 102nd Street in New York County, New York. Plaintiff Wayne Benjamin ("Benjamin") was riding as a passenger in the fourth vehicle, which was being driven by defendant/third-party plaintiff Sheila B. Heath ("Heath"). Benjamin alleges that he sustained a "serious injury" as defined in Insurance Law § 5102(d), when Heath's vehicle came in contact with another vehicle. Heath claims that the accident was caused by the negligence of the other drivers and she brings a third-party action against the owners of the first three vehicles, third-party defendants Bin Gong ("Gong"), Youamy E. Feliz ("Feliz"), and Roslyn Leasing, Inc. ("Roslyn"). Gong brings a second third-party action against the drivers of the second and third vehicles, second third-party defendants Victor A. Pimental ("Pimentel") and Amadou Traore ("Traore"), seeking contribution in the event he is found liable.

The depositions of Benjamin, Heath and Gong have been conducted.[1] The Note of Issue has not been filed. Before the Court are the following three motions and two cross-motions for summary judgment, pursuant to CPLR 3212: (1) Gong moves for summary judgment dismissing all claims against him on the ground that Benjamin did not sustain a serious injury; (2) Roslyn and Traore move for summary judgment in their favor on the issue of serious injury; (3) Feliz and Pimentel move for summary judgment dismissing all claims against them and granting judgment in their favor on the issues of liability and serious injury; (4) Gong cross-moves for summary judgment in his favor on the issue of liability; and (5) Roslyn and Traore cross-move for summary judgment in their favor on the issue of liability.

[1]On December 15, 2008, the Court issued an order precluding Feliz from testifying for failure to appear for deposition, and ordering preclusion of Traore and Pimentel in the event they failed to appear for depositions by January 23, 2009.

BACKGROUND

This lawsuit arises from a chain collision involving five vehicles that occurred on June 3, 2006, on the southbound FDR near its intersection with East 102nd Street. The first vehicle was a 2005 Toyota driven and owned by Gong. The second vehicle was a 1996 Nissan driven by Pimentel and owned by Feliz. The third vehicle was a 1998 Lincoln taxicab driven by Traore and owned by Roslyn. The fourth vehicle was a 2006 Chevrolet driven and owned by Heath. Benjamin was a passenger in the fourth vehicle. The fifth vehicle was unidentified and left the scene of the accident.

In support of their respective motions and cross-motions on the issue of liability, Gong, Pimentel, Feliz, Roslyn and Traore submit, *inter alia*, the depositions of Benjamin, Heath and Gong. In opposition, Heath submits the police accident report, which is uncertified and will therefore not be considered by the Court (*see Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009]; *Figueroa v Luna*, 281 AD2d 204, 205 [1st Dept 2001]).[2] Benjamin has submitted no opposition on the issue of liability, but opposes summary judgment on the issue of serious injury.

A. Benjamin's Testimony

Benjamin testified that on the day of the accident he was riding as a front-seat passenger in Heath's vehicle on the southbound FDR. Heath moved into the middle lane and then into the left lane traveling at about 25 to 30 mph. As Heath's vehicle was moving along, Benjamin observed a situation in front of them involving three vehicles that caused Heath to brake:

> "Q. What was it that you saw about that three car situation? Tell me specifically what it was that you saw?
>
> A. There was a car in front that had stopped short or stopped

[2]Pimentel and Feliz also submit a copy of the uncertified police report in support of their motion.

> abruptly which caused the car behind that to stop and the cab that was behind that stopped -- it seemed like as if they had already bumped each other" (Benjamin deposition at 23).

Benjamin did not actually see any collisions involving the vehicles in front of him, and indicated that all he "saw was the pile of three cars sitting" (*id.* at 25).

A few seconds after Benjamin observed the three vehicles, he felt a heavy impact from the rear that pushed Heath's vehicle forward into the third vehicle. The rear impact came from a fifth vehicle that left the scene. The owner and driver of the fifth vehicle are not named in this lawsuit.

B. Heath's Testimony

Heath testified that she was driving with Benjamin on the FDR and switched to the left lane traveling at about 25 to 30 mph. She described two separate impacts. The first impact occurred when Heath struck the rear of the third vehicle. She did not see the third vehicle in front of her, which was stopped, until she hit it.

After the first impact, Heath observed two more vehicles in front of the third vehicle. She did not see any actual impact between the vehicles:

> "Q. Did you see specifically one of the cars hit another car?
>
> A. No, I didn't see nothing but light.
>
> Q. Did you see any of the vehicles make contact with any of the other vehicles that were in front of you?
>
> A. No, I didn't sir" (Heath deposition at 29).

The second impact occurred when Heath's vehicle was struck in the rear by an unidentified fifth vehicle. Heath was looking in her rear view mirror and saw a vehicle approaching from behind which struck the rear of her vehicle. As a result of the second impact, her vehicle moved forward and hit the third vehicle once again. Less than a minute passed between the first impact and the second impact.

C. Gong's Testimony

Gong testified that he was driving on the FDR in the left lane at about 5 or 10 mph in slow "stop and go" traffic when his vehicle was hit from the rear by the second vehicle. He was moving when he was hit and there was only one impact. After the impact, he drove forward about ten feet and exited his vehicle. He observed three vehicles behind him. When asked if he saw any of the vehicles in contact with each other, Gong stated that they had hit each other:

> Q. Were any of the cars behind you in contact with each other that you observed?
>
> A. The vehicle in front of the third vehicle and the vehicle behind the third vehicle hit each other (Gong deposition at 14).

LIABILITY

Gong, Roslyn, Traore, Feliz and Pimentel all seek summary judgment dismissing the claims against them and granting judgment as a matter of law on the issue of liability. They each allege that they are not liable for Benjamin's injuries since their vehicles were hit from the rear.

"[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). This rule has been applied where the front vehicle stops suddenly in slow-moving traffic, and a "claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" *(id.*; *see also Francisco v Schoepfer*, 30 AD3d 275, 276 [1st Dept 2006]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). Moreover, in a "chain-reaction collision, responsibility presumptively rests with the rearmost driver" (*Mustafaj v Driscoll*, 5 AD3d 138, 138 [1st Dept 2004]; *see also Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]).

Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact requiring a trial (*see Cabrera*, 72 AD3d at 553-54). A failure to rebut the finding of negligence with admissible evidence requires judgment in favor of the other vehicle (*see Francisco*, 30 AD3d at 275-76 ["the injured occupants of the rear-ended vehicle are entitled to summary judgment on the issue of liability unless the driver of the offending vehicle provides a non-negligent explanation for the collision").

A. Gong

Gong argues that he is entitled to summary judgment on the issue of liability because his vehicle was the first vehicle in a chain of four vehicles and was struck in the rear while moving in stop-and-go traffic. Heath claims that she has provided a non-negligent explanation for the accident, since Benjamin testified that a vehicle in the front of the line "stopped short" which led to a chain of short stops and ultimately to the accident. Heath also asserts that there are questions of fact regarding who hit whom first and whether a series of short stops occurred.

Gong's deposition testimony that he was struck in the rear while his vehicle was moving in stop and go traffic establishes his prima facie entitlement to judgment as a matter of law (*see Cabrera*, 72 AD3d at 553; *Somers v Condlin*, 39 AD3d 289 [1st Dept 2007]). Heath has failed to provide a non-negligent explanation for the accident sufficient to rebut Gong's prima facie case. Her claim that Gong "stopped short," standing alone, is insufficient to rebut the presumption of negligence and, in any event, Benjamin and Heath testified that they did not actually see the contact that occurred between the first and second vehicles *(see Cabrera*, 72 AD3d at 553; *Francisco*, 30 AD3d at 275). Accordingly, Gong's cross-motion for summary judgment on the issue of liability is granted.

B. Roslyn & Traore

Roslyn and Traore argue that they are not liable for the accident because their vehicle, which was the third in the chain, was struck in the rear by Heath's vehicle. In opposition, Heath

argues that there was testimony that a fifth "phantom" vehicle caused her vehicle to impact Roslyn and Traore's vehicle. Heath also presents the same argument that Gong's vehicle "stopped short" that the Court has already rejected (*see supra*).

Roslyn and Traore have established their prima facie entitlement to judgment as a matter of law through Heath and Benjamin's testimony that Heath's vehicle struck the third vehicle, which was stopped, from the rear (*see Cabrera*, 72 AD3d at 553). It is well settled that a "driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles" (*see LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]). Heath has failed to rebut the presumption of negligence, and in fact concedes that she struck their stopped vehicle from the rear *(see Francisco*, 30 AD3d at 276). Even if there was an impact with a fifth "phantom" vehicle, Heath's own testimony establishes her liability during the first impact. Accordingly, Roslyn and Traore's cross-motion for summary judgment on the issue of liability is granted.

C. Feliz & Pimentel

Feliz and Pimentel argue that the cause of the accident rests exclusively with Heath, whom they claim struck the third vehicle causing it to be pushed into their vehicle and then into the first vehicle. Heath responds that there are issues of fact regarding who caused the accident, and further argues that Feliz and Pimentel's motion is unsupported since they do not submit their own testimony in support of their motion.

Feliz and Pimentel have established prima facie entitlement to judgment as a matter of law based on the testimony of Gong, a witness with personal knowledge (*see* CPLR 3212 [b]), that the second and third vehicles hit each other (*see LaMasa*, 56 AD3d at 340). Moreover, Feliz and Pimental's vehicle was the second vehicle in the chain, and it is well established that the rearmost driver in a chain-reaction collision bears a presumption of responsibility (*see Mustafaj*, 5 AD3d at 138; *Ferguson*, 34 AD3d at 357). Heath has failed to sustain her burden of presenting a non-negligent explanation sufficient to raise a triable issue of fact requiring a trial

(*see Ferguson*, 34 AD3d at 357). Accordingly, Feliz and Pimentel's motion for summary judgment on the issue of liability is granted.

SERIOUS INJURY

Gong, Feliz, Pimental, Roslyn and Traore (collectively "the serious injury defendants") also move for summary judgment on the issue of serious injury. Heath has submitted an affirmation in support of their motion and adopts the same arguments in the interest of judicial economy. Benjamin responds in opposition.

"Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that the plaintiff has not suffered a "serious injury" as defined in section 5102 (d) *(see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 352 [2002]*)*. Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]).

Benjamin alleges that the accident resulted in permanent injuries to his cervical spine, lumber spine and left shoulder, which include herniated discs, bulging discs and left shoulder contusion. The Court must determine whether, as a matter of law, Benjamin has sustained a serious injury under at least one of the following relevant categories: (1) permanent consequential limitation; (2) significant limitation; or (3) 90/180-day (*see* Insurance Law § 5102 [d]).

In support of their motions, the serious injury defendants submit, *inter alia*, affirmed medical reports of neurologist Dr. Ravi Tikoo and orthopedic surgeon Dr. Andrew B. Weiss; an affirmed report of radiologist Dr. Audrey Eisenstadt interpreting MRIs of Benjamin's cervical and lumbar spines; Benjamin's own medical records, including reports from Dr. Harvey Manes; the bill of particulars; and Benjamin's deposition.

Dr. Weiss conducted an orthopedic independent medical examination ("IME") on July 10, 2008. He set forth range of motion findings for the cervical spine, thoracolumbar spine, left shoulder and left hip, which were compared to the normal range and were normal. Straight leg rasing test was negative. Dr. Weiss diagnosed sprains of the cervical spine, thoracolumbosacral spine, left shoulder and left hip, all of which were resolved. Dr. Weiss found no residuals or permanence and concluded that Benjamin is not disabled from working and can perform all of his normal daily activities without restriction.

Dr. Tikoo conducted a neurological IME on July 11, 2008. Straight leg raising test was within the normal range. Dr. Tikoo found no significant clinical evidence of disc herniation and diagnosed cervicothoracic and lumbosacral strain. He concluded that Benjamin did not sustain a permanent injury and is not neurologically disabled.

Dr. Eisenstadt reviewed a July 19, 2006 MRI of Benjamin's cervical spine and opined that it revealed evidence of degenerative osteophyte formation and intervertebral disc changes that were greater than six months in origin and predated the accident. Dr. Eisenstadt also found bulging and herniated discs that were degenerative in origin. A July 19, 2006 MRI of the lumbar spine was normal.

Benjamin testified at his deposition that he remained in bed for a few days immediately following the accident and was out of work continuously for about six months. He was confined to his home until he returned to work doing light duty in January 2007. Activities that he could do before the accident but could no longer do after the accident included fishing and picking up his grandchildren and swinging them around. Activities that he was limited in doing included standing for long periods of time, walking long distances, lifting and bending. In the bill of particulars, he alleged that he was out of work for ten months and confined to home for two and a half months.

Based on the foregoing, the serious injury defendants have established a prima facie

case that Benjamin did not suffer a "serious injury" under the categories of permanent consequential limitation or significant limitation. They have proffered sufficient objective medical evidence demonstrating that Benjamin has normal range of motion and suffers from no orthopedic or neurological disability resulting from the accident (*see Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992] [defendant established prima facie case "through the affidavit of a physician who examined [the plaintiff] and concluded that she had a normal neurological examination"]; *Brown v Achy*, 9 AD3d 30, 31 [1st Dept 2004]).

Furthermore, Dr. Eisenstadt's report indicating that the injuries to Benjamin's cervical spine predated the accident and that his bulging and herniated discs were degenerative in origin shifted the burden of proof on the issue of causation (*see Linton v Nawaz*, 62 AD3d 434, 438-39 [1st Dept 2009] [defendants shifted burden based on expert's report asserting that abnormalities appearing on MRIs were degenerative in nature and preexisted accident]; *Colon v Tavares*, 60 AD3d 419, 419-20 [1st Dept 2009]).

The serious injury defendants have also sustained their initial burden of proof with regard to the 90/180-day category. A defendant can establish the nonexistence of a serious injury under this category absent medical proof by citing to evidence, such as the plaintiff's own testimony, demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting his or her customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]).

Here, the serious injury defendants sufficiently demonstrated that the injuries did not prevent plaintiff from performing "substantially all" of his usual and customary daily activities for the requisite time period (*see Licari*, 57 NY2d at 236). In his deposition and bill of particulars, Benjamin alleged confinement to bed for just a few days and to home for only two and a half months. These time periods are less than the 90/180 days required by the statute (*see Copeland*, 6 AD3d at 254 [home and bed confinement for less than the prescribed period

evinces lack of serious injury]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 664-65 [2d Dept 2008]).

Moreover, Benjamin's failure to work for more than three months is not determinative (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 556 [1st Dept 2009] [defendants made prima facie showing that plaintiffs did not sustain a 90/180-day injury even those each missed more than 90 days of work, where two of the plaintiffs admitted in depositions that they had not been confined to bed or home and the third said nothing about being prevented from performing substantially all of his usual daily activities for the relevant time period); *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006]).

Since the serious injury defendants have sustained their initial burden of establishing prima facie entitlement to summary judgment, the burden shifts to Benjamin to produce evidentiary proof in admissible form establishing the existence of a triable issue of fact necessitating a trial (*see Gaddy*, 79 NY2d at 957). In opposition, Benjamin submits *inter alia*, affirmed medical reports of orthopedic surgeon Dr. David Benatar and radiologist Richard J. Ruzzuti; certified medical reports of orthopedist Dr. Harvey Manes; and Benjamin's affidavit and deposition testimony.[3]

Dr. Manes conducted orthopedic examinations on July 25, 2006, August 8, 2006 and September 19, 2006. He tested range of motion of the left shoulder, cervical spine, and lumbosacral spine and compared the findings to the normal range, several of which were outside of the normal range. Dr. Manes diagnosed left shoulder contusion and sprains of the cervical spine, thoracic spine and lumbar spine. He also noted that Benjamin had moderate disability as a result of the accident.

Benjamin underwent a recent orthopedic examination with Dr. Benatar on June 26, 2009. Cervical, thoracolumbar and left shoulder range of motion was measured with a

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[3]The records of Dr. Manes are the same records that were submitted in support of the serious injury defendants' motions.

goniometer/inclinometer and compared to standard normals, some of which were outside of the normal range. Dr. Benatar diagnosed, among other conditions, cervical disc herniation, lumbar disc bulging and left shoulder impingement syndrome. Dr. Benatar noted that Benjamin was asymptomatic prior to the accident and that his prognosis to return to pre-injury status was poor. He also noted that, if the accident history given was accurate, a causal relationship existed to the accident.

Dr. Rizzuti affirmed the accuracy of MRIs of Benjamin's cervical and lumbosacral spine taken on July 19, 2006, and a MRI of the left shoulder taken on July 31, 2006. The MRI of the cervical spine showed disc herniations at C5-6 and C6-7 impinging on the anterior aspect of the spinal cord. The MRI of the lumbosacral spine revealed disc bulges at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal and on the spinal canal and on the neural foramina bilaterally. The MRI of the left shoulder revealed acromion impingement on the supraspinatus muscle and biceps tenosynovitis.

In his affidavit, Benjamin stated that since the accident his daily activities and functions have been significantly altered. His social activities have been limited and he can no longer perform activities that require extensive bending, lifting, muscle strength and flexibility. He is no longer able to fish, pick up his grandchildren without pain, or walk and sit for long periods of time. He did not work at all during the first six months following the accident.

Considering the evidence in the light most favorable to plaintiff (*see Kesselman v Lever House Restaurant*, 29 AD3d 302, 304 [1st Dept 2006]), the Court concludes that Benjamin has failed to present sufficient objective medical evidence to establish a genuine issue of fact sufficient to defeat summary judgment (*see Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]).

To the extent that Benjamin alleges a "serious injury" based on left shoulder contusion or cervical or lumbar sprains, such injuries do not, as a matter of law, constitute a serious injury

(*see Maenza v Letkajornsook*, 172 AD2d 500, 500 [2d Dept 1991] ["allegations of sprains and contusions are insufficient to establish that the plaintiff sustained a 'serious injury' as defined in the statute"]).

With regard to the remaining claimed injuries, the Court concludes that Benjamin has failed to raise a triable issue of fact regarding causation. None of Benjamin's experts addressed whether the injuries to his cervical spine were due to a preexisting, degenerative condition, as opined by the serious injury defendants' radiologist (*see Perez v Giouroukos*, 75 AD3d 488 [1st Dept 2010] [dismissing complaint where defendants' radiologist opined that herniated discs in plaintiff's lumbar and cervical spine were degenerative and preexisting and thus not caused by the accident, and in response plaintiff's expert failed to address or rule out injury from a preexisting degenerative condition]; *Thomas v Booker*, 76 AD3d 456 [1st Dept 2010]).

Notably, Dr. Rizzuti, who interpreted the same July 19, 2006 cervical spine MRI, expressed no opinion regarding causation at all (*see Colon*, 60 AD3d at 419-20 [no triable issue of fact where plaintiff's experts did not address defendants' prima facie showing that the injuries were due to preexisting, degenerative changes unrelated to any traumatic injury that could be attributed to the accident]); *Delfino v Luzon*, 60 AD3d 196, 198 [1st Dept 2009] ["plaintiff's exert did not even address, let alone rebut, the objectively substantiated findings of defendant's experts that plaintiff's conditions are congenital and degenerative, and therefore did not raise a triable issue of fact as to causation"]; *Nickolson v Albishara*, 61 AD3d 542, 542 [1st Dept 2009]; *Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009]).

Although Dr. Benatar opined that a causal relationship existed to the accident, he failed to address the evidence of an equally plausible preexisting condition, and his opinion regarding causation is therefore speculative (*see Ortiz*, 63 AD3d at 557 [plaintiffs failed to raise issue of fact on issue of causation where their physicians offered boilerplate language merely stating in

conclusory fashion that the injuries were caused by the accident and offered no factually based medical opinions ruling out degenerative conditions as the cause of the limitations]).

The Court additionally concludes that Benjamin has failed to establish a triable issue of fact under the 90/180-day category. Benjamin has conceded that he was confined to home for no more than two and a half months, and there is no indication that he was medically advised to refrain from work or certain activities (*see Glover v Capres Contracting Corp.*, 61 AD3d 549, 550 [1st Dept 2009] [plaintiff's self-serving deposition testimony regarding her inability to work for a period of time was insufficient to establish 90/180-day claim where bill of particulars alleged confinement to home or bed for a period of weeks but did not indicate that such confinement was medically ordered]; *Rodriguez v Abdallahy*, 51 AD3d 590, 592 [1st Dept 2008] [self-imposed absence based on plaintiff's subjective complaints of pain failed to establish 90/180-day claim]).

In any event, the limitations of which Benjamin complains -- *i.e.*, limitations regarding his ability to lift his grandchildren, fish, or walk and stand long periods -- do not constitute a curtailment of "substantially all" of his usual and customary daily activities sufficient to support a 90/180-day claim (*see Alloway v Rodriguez*, 61 AD3d 591, 592 [1st Dept 2009]; *Morris v Cisse*, 58 AD3d 455, 457 [1st Dept 2009]; *Cartha v Quin*, 50 AD3d 530, 530 [1st Dept 2008].

Accordingly, summary judgment is granted in favor of the serious injury defendants on the issue of serious injury. Further, having determined that Benjamin's injuries do not meet the serious injury threshold, the Court *sua sponte* grants summary judgment dismissing Benjamin's complaint as against Heath (*see* CPLR 3212 [b]).

For these reasons and upon the foregoing papers, it is,

ORDERED that Gong's motion for summary judgment on the issue of serious injury is granted; and it is further,

ORDERED that Roslyn and Traore's motion for summary judgment on the issue of serious injury is granted; and it is further,

ORDERED that Feliz and Pimentel's motion for summary judgment on the issues of serious injury and liability is granted; and it is further,

ORDERED that Gong's cross-motion for summary judgment on the issue of liability is granted; and it is further,

ORDERED that Roslyn and Traore's cross-motion for summary judgment on the issue of liability is granted; and it is further,

ORDERED that the Court *sua sponte* grants summary judgment dismissing Benjamin's complaint as against Heath on the issue of serious injury; and it is further,

ORDERED that the Clerk of the Court is directed to enter summary judgment in favor of Gong, Feliz, Pimental, Roslyn and Traore dismissing all claims against them, without costs; and it is further,

ORDERED that the Clerk of the Court is directed to enter summary judgment dismissing Benjamin's complaint as against Heath, without costs; and it is further,

ORDERED that Heath shall serve a copy of this order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: September 24, 2010

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**